

Pages 1 - 58

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

**Before The Honorable YVONNE GONZALEZ ROGERS, Judge**

EPIC GAMES, INC.,	)	
	)	
Plaintiff,	)	NO. C-20-5640 YGR
	)	
vs.	)	Wednesday, April 21, 2021
	)	
APPLE, INC.,	)	Oakland, California
	)	
Defendant.	)	PRETRIAL CONFERENCE NO. 4
	)	
APPLE, INC.,	)	
	)	
Counterclaimant,	)	
vs.	)	
	)	
EPIC GAMES, Inc.,	)	
	)	
Counter-Defendant.	)	
	)	

**REPORTER'S TRANSCRIPT OF ZOOM PROCEEDINGS**

**APPEARANCES:**

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**BY: KATHERINE B. FORREST, ESQUIRE**  
**GARY A. BORNSTEIN, ESQUIRE**

(Appearances continued.)

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Official Court Reporter

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

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22 **BY: STEVE BERMAN, ESQUIRE**

1 Wednesday, April 21, 2021

9:00 a.m.

2 P R O C E E D I N G S

3 o0o

4 **THE COURT:** Okay, good morning, everyone.

5 **MS. FORREST:** Good morning, Your Honor.

6 **MR. DOREN:** Good morning, Your Honor.

7 **MS. MOYE:** Good morning, Your Honor.

8 **THE COURT:** Ms. Stone, let's go ahead and call the  
9 case.

10 **THE CLERK:** Calling Civil action 20-5640 Epic Games,  
11 Inc. versus Apple, Inc.

12 Counsel, please state their appearances.

13 **MS. FORREST:** Katherine Forrest for plaintiff Epic  
14 Games.

15 **MR. BORNSTEIN:** Good morning, Your Honor. Gary  
16 Bornstein also for Epic.

17 **MR. DOREN:** Good morning, Your Honor. Richard Doren  
18 for Apple.

19 **MS. MOYE:** Good morning, Your Honor. Veronica Moya  
20 for Apple.

21 (Simultaneous colloquy.)

22 **MS. BYRD:** I'm sorry.

23 **MS. TOWNSEND:** I'm sorry, Rachele. Go ahead.

24 **MS. BYRD:** Good morning, Your Honor. Rachele Byrd,  
25 Wolf Haldenstein, on behalf of the Consumer plaintiffs in the

1 related action.

2 **MR. BERMAN:** Good morning, Your Honor. Steve Berman  
3 on behalf of the Developers.

4 **MS. TOWNSEND:** Good morning, Your Honor. Katie  
5 Townsend on behalf of the Reporters Committee for Freedom of  
6 the Press and 18 news organizations.

7 **THE COURT:** Okay. Good morning, everyone.

8 As the parties can see, I invited Ms. Townsend, Ms. Byrd,  
9 and Mr. Berman to join us this morning just for a brief period  
10 to deal with the public access issues.

11 Once we address those, then I will ask them to turn off  
12 their videos as they are not parties, really, to the rest of  
13 the things that we need to do in our pretrial.

14 Let's talk about that first. I've read the motions. I  
15 think that there has been, and we have seen some of the  
16 Twitter feed -- not just Twitter, but some of the social media  
17 feed. There seems to be some confusion, and certainly the  
18 related-case lawyers seem to be confused as well.

19 With respect to what is being done here, there is no video  
20 access to anyone; not to the parties, not to their teams, not  
21 to anyone. I said in our last conference that the  
22 Administrative Office of the Courts does not allow me to video  
23 trials. And even though -- I know, Ms. Townsend, you have  
24 mentioned some things in your motion, but they actually don't  
25 help.

1 Frankly, look, if I could video something, I would. I'm  
2 all in favor of public access but it's not allowed. And  
3 courts, federal courts, that are using Zoom for trials are not  
4 allowing people to watch the video.

5 Everybody gets audio access; we use the Zoom platform to  
6 provide audio access and we will do that here. We will also  
7 use the platform in the event for health and safety reasons  
8 that a witness cannot physically attend.

9 In that event, I will -- the lawyers and I will access  
10 that person remotely using Zoom. But no one else other than  
11 those people in the courtroom will be able to see it.

12 So, I'm going to go into how I am going to give what I  
13 think is more than adequate public access, but I want to know  
14 if anybody has any questions about the first piece.

15 Ms. Townsend, do you have any questions?

16 **MS. TOWNSEND:** I don't, Your Honor. Thank you for  
17 clarifying that.

18 **THE COURT:** Ms. Byrd?

19 **MS. BYRD:** I just have one clarifying question about  
20 will there be Zoom access for Epic and Apple's trial teams who  
21 are not in court?

22 **THE COURT:** No.

23 **MS. BYRD:** I misunderstood that based on prior  
24 comments.

25 **THE COURT:** And I understood your misunderstanding

1 because I read it in your papers. Their teams, which will be  
2 outside of the courtroom, will not have video access. No one  
3 has video access.

4 **MS. BYRD:** Understood.

5 **THE COURT:** I don't know how to say it more clearly.

6 Mr. Berman?

7 **MR. BERMAN:** No questions. It's clear now. Thank  
8 you.

9 **THE COURT:** Okay.

10 I understand that there is a significant amount of  
11 interest in the case. And this is what -- this is what I am  
12 planning on doing, but I brought the three additional lawyers  
13 on to give me feedback before I issue any orders.

14 One is that right now, based upon the restrictions that  
15 are imposed on me by the Court, and "by the Court," I mean by  
16 the Northern District combined agreement of all judges, we  
17 have protocols in place. We have had jury trials in the  
18 courthouses; judge Tigar just finished one in this courthouse,  
19 but we have protocols. And we are supposed to have two jury  
20 trials happening during the Epic/Apple trial. So there are  
21 limitations on what I can do.

22 I do have a seat available in the courtroom which I will  
23 designate for the media. One seat, Ms. Townsend. You all are  
24 going to have to decide who gets that seat and who is the -- I  
25 think what you've called it, the pre-authorized person whose

1 name I will need. I am not going to be in the business of  
2 trying to figure out who in the media gets that one seat. So  
3 you all are going to have to figure it out among yourselves.

4 And what I would like from you is some kind of protocol  
5 that if you can file it with me by, let's say Friday, if you  
6 think that's enough time, for how you are going to decide in  
7 an equitable manner who is going to get that one seat, and  
8 whether it rotates or not I don't -- it doesn't matter to me,  
9 but it is one seat in the courtroom.

10 I am trying to get a couple more seats, but I cannot  
11 guarantee at this moment that I can get a couple more seats.  
12 So right now I've got one seat.

13 All right. Ms. Townsend, can the media work on a protocol  
14 for figuring out who gets to sit in that one seat?

15 **MS. TOWNSEND:** Yes, Your Honor. I'll consult with my  
16 clients. I'm sure we will come up with a pool arrangement  
17 that will be -- that will be satisfactory to everybody. We  
18 can file something I think by Friday that updates Your Honor  
19 on what that protocol -- what we would propose that protocol  
20 to look like.

21 **THE COURT:** Okay. Terrific.

22 Now, I have questions because we have phone lines, but  
23 when you get into the -- we have done a lot of research, and I  
24 want to thank on the record our IT group who's been helping me  
25 on a daily basis try to figure this stuff out.

1 After a certain number of people on our phone lines that  
2 we link into the Zoom platform, we have to pay per person.  
3 And the federal courts, although we have some resources, we do  
4 not have unlimited resources.

5 So, what I would like to know from the parties is, how  
6 many people do you think -- how many people do you think are  
7 going to be calling in?

8 The reason that I ask this is that originally we talked  
9 about just one phone line for the parties -- your war team,  
10 whatever, the corporate representatives to use. We are now  
11 being told by the AO that the parties should access, if it's  
12 efficient, should access the audio through Zoom. If we do  
13 that, it frees up a phone line. But I need to make sure that  
14 there's adequate capacity.

15 So, how many people do you think will be dialing in, so to  
16 speak?

17 **MS. FORREST:** Your Honor, for Epic, there will be  
18 both a legal team who -- as well as some paralegals and  
19 support folks and some business folks will be non-witnesses  
20 who will be able to listen. So I think that our total number  
21 would be somewhere in the vicinity of 25.

22 **THE COURT:** Okay. So that's not so bad. That  
23 certainly I can accommodate, I assume.

24 What about you, Mr. Doren?

25 **MR. DOREN:** Your Honor, I will say in the same



1 ballpark.

2 **THE COURT:** That's an additional 50, which is easily  
3 accommodated by Zoom.

4 And then for purposes of sealing, you have to be  
5 comfortable that everybody who has access to that Zoom  
6 platform is -- can be in the proceedings when they are sealed.

7 **MS. FORREST:** Your Honor, I think the parties will be  
8 able to work out a protocol to ensure that those individuals  
9 who need to drop at certain points, if there are any, that we  
10 can work that out. We will handle that with a stipulation  
11 with the parties.

12 **THE COURT:** Mr. Doren?

13 **MR. DOREN:** Agreed.

14 **THE COURT:** Okay.

15 So then what I can do is, I can have a specific line for  
16 media and for the attorneys in the two related cases.

17 What we have done is created a Survey Monkey so that those  
18 individuals, whether media or attorneys in those related  
19 cases, can complete a request which our administrative staff  
20 will manage, and will give you special access to that link so  
21 that we know that you have access.

22 Then I can have a third -- the third line, so to speak,  
23 one internal, two external would be for the public at large.  
24 And that line I would -- I could advertise the phone number on  
25 my web page and on the website -- or the Court's home page so

1 that people can have access.

2 If -- you know, it could be -- again, I don't know what  
3 the volume is going to be. As I said to you before -- unless  
4 you do. If somebody has a good sense of what that volume is  
5 going to be, I would be happy to hear.

6 I do think that, you know, this trial -- and, again, I say  
7 this primarily for the public, the lawyers know -- but this  
8 trial is going to last 15, maybe 16 days, maybe 17 days; it  
9 depends on how many questions I ask.

10 There are some out there in the public who think that on  
11 May 3rd, they are going to know whether Fortnite is back on  
12 the Apple devices. You will not know that on May 3rd, that is  
13 the first day of trial.

14 So this I'm now talking not to the lawyers but to the  
15 public. No one is going to know that until after I write a  
16 decision, which won't happen until after the trial is over.  
17 So, anybody who thinks it's going to happen May 3rd, it's not  
18 accurate. That's just the first day of a long trial. Not the  
19 longest trial I've ever done, but this isn't a week-long  
20 trial.

21 So, in terms of the media, Ms. Townsend, can you give me  
22 any sense about how many people might access that line?

23 **MS. TOWNSEND:** I wish I could, Your Honor. I would  
24 wager that you'd have every day at least a couple dozen  
25 reporters every day. It could be upwards of 50. It could be

1 up to a hundred. There's -- it's very possible that some news  
2 organizations have multiple attorneys -- excuse me, multiple  
3 reporters covering this.

4 So I don't think we are going to be in the area of  
5 thousands for the media line, but I could certainly see us  
6 hitting where we are right now. I think there's 111, looks  
7 like, participants currently. So I can see us being there on  
8 a daily basis.

9 **THE COURT:** Okay. Ms. Byrd?

10 **MS. BYRD:** Yes, Your Honor. For Consumer plaintiffs,  
11 I think five, ten at the most people would want to listen in  
12 on the dedicated line.

13 **THE COURT:** Okay. Mr. Berman?

14 **MR. BERMAN:** For the Developers, Your Honor, no more  
15 than five.

16 **THE COURT:** Okay.

17 So, I can easily have a 200-line dedicated to the media  
18 and the attorneys for the related cases. Sounds like that's  
19 more than sufficient to provide access on a daily basis.

20 Then what I will do is, for the public at large, I will  
21 try to get a line that accommodates -- well, at least a couple  
22 hundred. We are looking into a 500-line or maybe we can get  
23 two 200 lines and that will be 400.

24 In any event, with all of this, that is certainly more  
25 than anybody would ever get with an audio feed into a

1 courtroom, an overflow courtroom. And if we find that, you  
2 know, people are still complaining, perhaps I can get another  
3 line in. But I think I will start with that. And if it  
4 doesn't seem to be adequate, then I can see if I can make  
5 additional arrangements.

6 Does that work for everybody? Does anybody have any  
7 concerns about public access that I should know about?

8 (No response.)

9 **MS. TOWNSEND:** That sounds great to me, Your Honor.  
10 Thank you. We appreciate it.

11 **THE COURT:** Okay. Hearing none.

12 The other piece of the request, Ms. Townsend, were  
13 exhibits. And I want to thank the parties for meeting and  
14 conferring and making a recommendation on those.

15 Did you have -- I don't know if you saw what they filed on  
16 the docket. I asked them to file that. If you have any  
17 questions -- although I did have a question. I thought that  
18 you were only going to upload exhibits that were admitted, not  
19 necessarily introduced.

20 Your proposal said you were going to upload exhibits that  
21 were introduced. Which are you going to do?

22 **MS. FORREST:** Your Honor, the concept is that it  
23 would be those which were admitted with an exception, which is  
24 if there are demonstratives, where the demonstrative may have  
25 been received for purposes of just identification, we would

1 like to be able to upload those as well.

2 **THE COURT:** I think more is better. But the -- but  
3 certainly in terms of the order, I could say, you know,  
4 demonstratives as well.

5 I guess -- what do you want me to order? I'm happy to  
6 order that things that have been admitted be uploaded and then  
7 I can leave to your discretion whether you want to upload  
8 other things. Unless you want me to order that anything --  
9 that demonstratives also be uploaded so that it's fair to both  
10 sides.

11 **MS. FORREST:** I think, Your Honor, from our  
12 perspective, demonstratives would also be useful. I don't  
13 know if that presents any issues for anyone else, but I think  
14 it would help the public to sort of understand what's  
15 happening, and the parties who are not present in the  
16 courtroom to understand what is happening.

17 We can probably meet and confer on that, but I think all  
18 the parties --

19 **THE COURT:** I'm working on an order so I would like  
20 to know.

21 Mr. Doren, your perspective?

22 **MR. DOREN:** I think admitted exhibits and  
23 demonstratives makes sense.

24 **THE COURT:** Okay. So I will order both.

25 What I am going to need from you is, I'm assuming that

1 there will be a link. So when will you have that link  
2 available to me so that, again, I can publicize that on the  
3 website?

4 **MS. FORREST:** I think we can be able -- we will be  
5 able to get the information for the link -- today is  
6 Wednesday, by the end of the week, early part of next week if  
7 that suits Your Honor.

8 **THE COURT:** How about by the 28th so that my team has  
9 time to make sure it's there?

10 **MS. FORREST:** That would work, Your Honor.

11 **THE COURT:** Okay. Any concerns about that?

12 **MS. TOWNSEND:** Your Honor, I apologize. My screen  
13 froze momentarily. It wasn't clear to me whether  
14 demonstratives would be included or would not be included in  
15 that.

16 **THE COURT:** They will.

17 **MS. TOWNSEND:** Okay. We're -- we have no objections  
18 to this approach. Thank you.

19 **THE COURT:** Any concerns, Ms. Byrd, Mr. Berman?

20 **MR. BERMAN:** None, your Honor.

21 **MS. BYRD:** Not with regard to the exhibits, Your  
22 Honor. I just had one question.

23 I appreciate the access to the audio, the dedicated  
24 access. I was just wondering if there was any way to give us  
25 one seat in the courtroom as the media --

1           **THE COURT:** As of today, no. I will work on it.

2           **MS. BYRD:** Thank you.

3           **THE COURT:** There was a question about redactions.

4           What was the issue, Ms. Forrest, Mr. Doren?

5           **MR. DOREN:** Your Honor, the parties were discussing  
6 whether the documents used with witnesses should be redacted  
7 prior to their use with the witness or subsequent to that and  
8 before final submission to the Court.

9           I believe we worked our way through that issue. And that  
10 the current plan is, as part of the meet-and-confer process,  
11 on any objections to exhibits we will redact any personal  
12 identifying information and the like. And with the parties  
13 reserving their right to use redacted information if it's  
14 relevant to the issues in the case.

15           **THE COURT:** I certainly don't need people's home  
16 addresses, you know, that kind of personal information. I  
17 won't need it so I don't know why anybody else would need it.  
18 It seems to me easier to redact things in advance. We are not  
19 doing it on the fly during trial, that's probably better. I  
20 know I'm sensitive about my own private information, so....

21           **MS. FORREST:** Your Honor, just to be clear. The  
22 thought is that the document that then is used in court, if it  
23 is received, would be the version of the document that would  
24 then be uploaded for the public's access.

25           **THE COURT:** Right. Right.

1           Let me circle back, Ms. Byrd, to your question. I have to  
2           say, that when I read your request, I don't understand how it  
3           is that you think Apple is getting an advantage over the  
4           plaintiffs in the related cases.

5           The witnesses who are testifying for the plaintiff Epic  
6           aren't testifying, I suspect, in your case. The other  
7           witnesses are the Apple's -- are Apple's witnesses, and they  
8           are Apple's witnesses. So, how they would have an advantage  
9           over you when they have access to their own witnesses doesn't  
10          make any sense to me.

11          I understand that you would like to be in the courtroom,  
12          but I don't see how you can argue that Apple is getting some  
13          unfair advantage.

14               **MS. BYRD:** That's a fair point, Your Honor. I  
15          just -- the conduct of the trial, how the witnesses testify on  
16          the stand, their credibility, Apple will be able to view all  
17          of that.

18               **THE COURT:** But they are their witnesses.

19               **MS. BYRD:** Understand, Your Honor. There are other  
20          third parties that will be testifying that are not Epic  
21          witnesses and they are not Apple employees or former  
22          employees. They are developers, I believe, so --

23               **THE COURT:** But are they going to testify? Have you  
24          identified them as people who are testifying in your case?

25               **MS. BYRD:** We haven't gotten that far, Your Honor.



1           **THE COURT:** Then you have no idea.

2           **MS. BYRD:** I do not.

3           **THE COURT:** Then, again, I don't see how there's any  
4 prejudice.

5           **MS. BYRD:** Okay. Understood, Your Honor.

6           We would just like as much access as possible since Apple  
7 will be present and because the evidence that is admitted at  
8 this trial could have an impact on our trial.

9           **THE COURT:** I agree. I just don't see any prejudice.

10          I think that it is important to keep the rhetoric down  
11 because it doesn't help. Now, I understand litigators like to  
12 have rhetoric out there, but I don't think it helps. And I  
13 don't think it was appropriate to argue prejudice when there  
14 is none. And you can't even articulate any here.

15          So, I will try, and I am trying and I am pushing back, to  
16 try to get more seats in the courtroom but I'm constrained.  
17 So, believe it or not, federal judges, we do have constraints  
18 whether we like it or not.

19          So, okay. Let's move on.

20          Is there anything else, Ms. Townsend, from your end that I  
21 need to address or haven't addressed?

22           **MS. TOWNSEND:** No, Your Honor. I think that covers  
23 everything that we asked for and we'll be sure to file  
24 something by end of day Friday concerning the pool seat that  
25 you made available. And we appreciate your attention to these

1 matters. Thank you.

2 **THE COURT:** Ms. Townsend, I understand, too, I would  
3 hope that you will reach out more broadly to media other than  
4 just the ones that you represent. I want to make sure that,  
5 again, the media is being viewed broadly for purposes of the  
6 trial.

7 **MS. TOWNSEND:** We will, Your Honor. Thank you.

8 **THE COURT:** Okay.

9 Ms. Byrd, anything else from your end?

10 **MS. BYRD:** No, Your Honor.

11 **THE COURT:** Mr. Berman?

12 **MR. BERMAN:** No, Your Honor.

13 **THE COURT:** Okay. Then I'll go ahead and ask you all  
14 to turn off your videos. You are welcome to stay on the  
15 platform to hear if you want to hear, but you don't have to go  
16 out and then back in again.

17 **MR. BERMAN:** Thank you, Your Honor.

18 **MS. BYRD:** Thank you.

19 **THE COURT:** Thank you.

20 Okay. So let's go to your list. I have a list of things  
21 I want to accomplish as well today, but we'll start with your  
22 list that you emailed me last night.

23 The first issue you wanted to talk about was the COVID  
24 protocol. So mask use by arguing/questioning attorney and  
25 testifying witness.

1 Whose issue is this?

2 **MR. DOREN:** Your Honor, I think it's a joint issue.  
3 We met and conferred on this, and both parties, if the Court  
4 is comfortable with it, would like the opportunity for both  
5 the questioning attorneys and for the witnesses to testify  
6 without masks with, of course, the witness having discretion  
7 on that as well.

8 **THE COURT:** So here -- I have to think about this.

9 Here's the issue: The science is that the spread of  
10 COVID-19 is reduced significantly if you wear masks. Now, we  
11 don't ask whether people have received the vaccine or not.  
12 And because of that, I can't be sure who is vaccinated and  
13 who's not. So I am reluctant to grant the request because it  
14 would increase -- potentially increase risk.

15 That's my concern. I've got the vaccine. I'm not  
16 concerned for myself. The witness and the questioning  
17 attorney are on the far side of the courtroom. There are  
18 shields in place. But that's my concern.

19 **MR. DOREN:** And, Your Honor, our thinking, and I  
20 think I say our joint thinking was, given the presence of  
21 shields and the distance between the individuals involved,  
22 that recognizing that everyone at tables or in any closer  
23 proximity would be wearing masks, that the risks would be  
24 mitigated substantially and it would facilitate the Court's  
25 opportunity to assess the witness, the questioning attorney's

1 opportunity to breathe, and the court reporter's ability to  
2 hear everyone.

3 **MS. FORREST:** And, Your Honor, if I might add, we  
4 could also confer in advance. And if there are witnesses, for  
5 instance, or other personnel who we learn are uncomfortable  
6 with that situation, we can try to resolve it on a  
7 case-by-case basis. There may be witnesses who are not  
8 comfortable proceeding in that manner, and we can take care of  
9 that, but we thought it would be useful to do it when we could  
10 and when we had a courtroom limited number that were  
11 comfortable with this.

12 **MR. DOREN:** Agreed.

13 **THE COURT:** All right. Well, I will think more about  
14 it.

15 There is -- like I said, we don't ask. And the staff that  
16 is closest is the court reporter and I have the courtroom  
17 deputy who are in that area between the questioning attorney  
18 and the witness. So, you know -- and we've got the law clerks  
19 as well. So it's not -- it's not just a question of you, as  
20 individuals, it's a question of everyone in the courtroom. So  
21 right now our protocol is that you wear masks.

22 I can say that some masks work better than others when you  
23 have to do a lot of talking. When I sentence and take pleas,  
24 I wear the surgical mask. They don't look the best, but  
25 surgeons wear them all the time, right, for many hours to do

1 their work, and they can communicate.

2 And like I said, I don't always think they look the best,  
3 but they certainly work for the ability to breath and talk and  
4 hear each other.

5 **MR. DOREN:** Thank you, Your Honor.

6 **THE COURT:** Let's see. Media access we've talked  
7 about.

8 Depo designations. This was the next issue.

9 **MR. DOREN:** Go ahead, Ms. Forrest.

10 **MS. FORREST:** The parties -- first, I would like to  
11 say that we have made great progress with Judge Laporte in  
12 resolving objections. So really we have a logistical issue,  
13 which is, for the time that is not going to be part of what we  
14 are just calling for shorthand sake the four-hour portion that  
15 will go to Your Honor, but the remainder, does -- is it the  
16 case --

17 **THE COURT:** I don't know what the -- I don't know  
18 what you are talking about. You're making a distinction I  
19 don't understand.

20 **MS. FORREST:** Let me back up.

21 There was a point in time when Your Honor had indicated  
22 that you would read four hours that the parties submitted to  
23 you. So we are thinking of that, those four hours, as  
24 separate from the remainder. There may be additional  
25 designations which the parties may want to introduce into

1 their case. And the question for Your Honor is, whether or  
2 not they will go in in writing at the appropriate time or  
3 whether or not Your Honor would want them played in court.  
4 And either is fine.

5 I think we had thought they would likely go in in writing  
6 with the exception of instances when a party might find a  
7 particular clip, relatively short, hopefully, that would be  
8 useful to play for demeanor, or some other purpose, but the  
9 bulk of them would go in in writing.

10 **MR. DOREN:** And toward that end, Your Honor, we  
11 believe, Apple believes that everything should simply go in in  
12 writing rather than there being, you know, some greatest hits  
13 and then everything else in writing.

14 **THE COURT:** Well, what is your question? That is,  
15 okay, if you submit it in writing, then, you know, time is --  
16 the time is taken off of your -- off of the number of hours  
17 I've given you. If it happens in the courtroom, the time is  
18 taken off the number of hours I've given you.

19 So I'm not exactly sure what your question is.

20 **MS. FORREST:** Let me pose it this way, Your Honor.  
21 We think the time would be exactly the same in either  
22 scenario. Epic would like the opportunity to play certain  
23 clips in court if we deem those clips to be something that the  
24 Court would find useful to see sort of on video versus in  
25 written form.

1           We just want the ability to do that. So the time is not  
2 going to change. It's just a manner of presentation of our  
3 case.

4           **THE COURT:** I don't dictate how you present your  
5 case. You want to do it in the courtroom, you do it in the  
6 courtroom. I don't care. You each have the same amount of  
7 time. So you can play them in the courtroom.

8           **MS. FORREST:** Thank you, Your Honor.

9           **MR. DOREN:** And alternatively, Your Honor, it's also  
10 acceptable for both parties to submit the balance to the Court  
11 in writing as opposed to playing them in court?

12           In other words, if the Court has a preference not to have  
13 to read them, even though they are going against our time and  
14 but rather hear them in court, I want to make sure we  
15 understand the Court's position.

16           **THE COURT:** If you give them to me to read and -- you  
17 know, then I'll read them. I can generally read faster than  
18 those clips happen. But, like I said, because we can't -- I'm  
19 not going to sit here and try to -- I'm not going to clock  
20 myself in terms of how long it takes me to read.

21           So the time is measured by the -- you all agree on what  
22 that time allocation is. And if you ask me to read it, then  
23 I'll read it as opposed to listening to it in the courtroom.

24           **MR. DOREN:** Thank you, Your Honor.

25           **MS. FORREST:** Thank you.

1           **THE COURT:** Okay. That last bullet, though, I don't  
2 understand that question about exhibits.

3           **MR. DOREN:** Your Honor, I think we just -- I think  
4 the parties just need clarification. We talked about this  
5 issue a little bit. We just want to know mechanically how the  
6 Court would like it to work.

7           So, obviously, with the depo excerpts, certain documents  
8 are being introduced into evidence through those witnesses. I  
9 know that the Court's most recent order included -- Case  
10 Management Order included a reference to a stipulation  
11 identifying the exhibits.

12           And so the question, Your Honor, is, when the parties  
13 submit -- both sides submit their four hours, should they  
14 include a joint stipulation attaching the exhibits identified  
15 and offered for admission through those excerpts, and then  
16 will they then be in evidence for the trial at the same time  
17 the first live witness takes the stand?

18           **THE COURT:** So, if I need to see the exhibits to  
19 understand the testimony, you need to give me the exhibits.  
20 Sometimes the question is self-contained and I don't need the  
21 exhibit. But if you -- if I need them, you need to give them  
22 to me. So that's one.

23           Two, as long as I have a stipulation that says, you know,  
24 when you give me everything to read, and a stipulation, let's  
25 say there are 10 exhibits that you all agree come in, I'll



1 just enter that as part of the order and they are in.

2 **MR. DOREN:** All right.

3 **THE COURT:** Does that answer the question?

4 **MR. DOREN:** That is very helpful, Your Honor.

5 And to the extent we submit exhibits to the Court within  
6 the framework you just identified, would we lodge those with  
7 the Court as opposed to file them through ECF?

8 **THE COURT:** You can. That's fine.

9 **MR. DOREN:** Thank you.

10 **MS. FORREST:** And then one additional point that  
11 follows on this --

12 **THE COURT:** Let me think about this, though.

13 We are going to have to have something -- it may be that  
14 for purposes of any appellate record, I need to have all of  
15 those deposition transcripts as an exhibit that get  
16 technically admitted; otherwise I don't know how else it  
17 becomes part of your trial transcript.

18 **MR. DOREN:** That makes sense, Your Honor.

19 **THE COURT:** Right. Because it's not testimony that  
20 is being transcribed, but it is testimony that is being  
21 considered.

22 **MR. DOREN:** In Your Honor's order, you said that each  
23 deposition designation shall bear the exhibit marking depo,  
24 insert number. So if we prepare those exhibits with that type  
25 of numbering and submit it to the Court --

1           **THE COURT:** Then on the first day of trial, I can  
2 just admit those.

3           **MR. DOREN:** Perfect.

4           **THE COURT:** And then we will have to have a clean  
5 copy for the courtroom deputy who keeps the official exhibits.

6           So I'll need a copy for me, obviously, but my personal  
7 copy I usually mark up. So that should not be the official  
8 copy for the courtroom deputy, for Ms. Stone.

9           **MR. DOREN:** Understood.

10          **MS. FORREST:** And the related issue, Your Honor, I  
11 think which follows from this is there are additional  
12 documents which are not part of this four-hour segment which  
13 will come in through deposition designations. And for those  
14 which were prepared and all objections are resolved at the  
15 outset of the case, during Epic's case we would like to offer  
16 those potentially early, at least for some of them, so that  
17 they are in the record and they would then be part of what we  
18 would rely on going forward.

19          **THE COURT:** Okay. I'm not sure I'm with you  
20 Ms. Forrest. What are you -- be a little more explicit.

21          **MS. FORREST:** There are the four hours of deposition  
22 designations which have their documents, and we have just  
23 spoken about those.

24          There will be some additional number of documents which  
25 are not part of that four-hour group which will also come in

1 by way of deposition designation. And just logistically, one  
2 of the ways to get those in would be just to offer them early  
3 in the case, early in our case, and those would then be in for  
4 all purposes going forward. And we wanted to make sure that  
5 process would be acceptable to you.

6 **THE COURT:** Well, I don't want you to provide  
7 documents that aren't ultimately -- that aren't going to be  
8 used.

9 So, why -- I don't understand why we would do it that way.

10 **MS. FORREST:** Okay. Perhaps let me back up and  
11 explain.

12 In our findings of fact, particularly since some of our  
13 evidence in our findings of fact came from the depositions of  
14 Apple witnesses, we also authenticated documents of those  
15 Apple witnesses through depositions and then cited some of  
16 those in the findings of fact.

17 The concept is we will just logistically need to get those  
18 into evidence. We have resolved the objections where there  
19 were any and, again, logistically, what we want to do is,  
20 these are not part of the four-hour portion that Your Honor  
21 would be reading, but there are some documents which have been  
22 duly authenticated through depositions, we would want to offer  
23 those in the case relatively early to be able to have those as  
24 part of then the trial record.

25 **MR. DOREN:** Again, Your Honor, we hadn't talked about

1 this yesterday so I, too, want to make sure I understand.

2 Presumably these would be deposition designations that  
3 would then go against Epic's time at trial?

4 **MS. FORREST:** Oh, absolutely. Absolutely, Your  
5 Honor. The concept is that every single minute of any  
6 deposition designation would go against their proffering  
7 party.

8 To give Your Honor a sense of the magnitude, it is about  
9 an hour. And we're not planning on playing any of this, but  
10 in terms of the amount of time, if you will, that is  
11 associated with these documents, it's around --

12 **THE COURT:** Here's my concern, Ms. Forrest.

13 I really don't like it when you all go to the Court of  
14 Appeal and make arguments about things that you never argued  
15 at the trial and dig out things that were never discussed  
16 during the trial because you just dumped stuff on the Court.

17 So my -- so I don't -- if something is important, I would  
18 assume that it's going to get -- you either are going to ask  
19 me to read it or it will be discussed at the trial.

20 So, for instance, if you've got Exhibit 52 that's in this  
21 group that you are talking about, and you want it in evidence,  
22 I would think at some point someone is going to talk about  
23 Exhibit 52. So why wouldn't we just deal with it when it  
24 became relevant?

25 **MS. FORREST:** Well, Your Honor, there are a couple of

1 situations where what we have done is, through the deposition  
2 process, we have obtained testimony that authenticates a  
3 document. We don't need to call the witness to trial to  
4 simply authenticate the document again; the document speaks  
5 for itself. It is cited in the findings of facts, so it is  
6 not something that is sort of a document that Your Honor would  
7 not have understood was part of what we are thinking of in  
8 the -- as coming out during the trial, it would be one of the  
9 arguments we've already proffered.

10 It is simply a logistical way of receiving the deposition  
11 designations. We can do it just part of the as-we-go process  
12 as we have already discussed and do it that way. There will  
13 be a number of documents where we have gotten the  
14 authenticated testimony through witnesses at deposition, cited  
15 in the findings of fact. It's really a logistical question of  
16 being able to get those in.

17 **THE COURT:** Any response?

18 **MR. DOREN:** Just so we share the Court's concern that  
19 there will be sponsoring witnesses for each exhibit, and we  
20 don't think that random citations in the findings of fact  
21 satisfy that.

22 **MS. FORREST:** Let me sort of -- I'm sorry. I must be  
23 unclear. It is not -- we have a sponsoring witness for each  
24 and every one of these documents. The sponsoring witness is a  
25 deposition which has been duly taken, the witness is within

1 the proper --

2 **THE COURT:** It sounds like it will be fine.

3 Again, it seems to me the best way to deal with this is by  
4 stipulation so that you identify the deposition portions that  
5 authenticate the document, the other side verifies that. If  
6 there's no dispute, then provide me a stipulation that says  
7 these exhibits, we agree, should be admitted. Here's the  
8 supporting documentation, and then that will be fine.

9 **MS. FORREST:** Thank you, Your Honor. That solves it.

10 **MR. DOREN:** Thank you, Your Honor.

11 **THE COURT:** I'm going to -- I think we are done with  
12 this segment, right? Is there anything else?

13 **MS. FORREST:** Yes, Your Honor.

14 **THE COURT:** Hold on just a moment.

15 (Pause in the proceedings.)

16 **THE COURT:** So it is great to have law clerks who are  
17 young and totally in tune with what's happening on a much  
18 faster basis than I ever would.

19 Apparently Reuters is already incorrectly reporting  
20 something that happened in this -- in just within the hour.  
21 Reuters is reporting that Apple and Epic will have to decide  
22 which member of the media will attend the trial.

23 That is wrong. Reuters is wrong. The media has been  
24 represented by Ms. Townsend. Ms. Townsend, if you are still  
25 here, put your video back on. Hello?

1 The media group that filed a request for access who is  
2 represented by Ms. Townsend here today will make that  
3 decision. So, Ms. Townsend, if you could have your people  
4 send a note so that we stop getting inaccurate reporting, I  
5 would really appreciate it.

6 **MS. TOWNSEND:** Thank you, Your Honor. We will make  
7 sure that in-house attorneys at Reuters understand what you've  
8 decided today.

9 Thank you.

10 **THE COURT:** Okay.

11 The other question that continues to be out there  
12 apparently is why there is no overflow room with video access.  
13 There are a couple of reasons why.

14 One is that federal courts don't do that. We don't video  
15 live testimony.

16 Second, this courthouse has six courtrooms. There are two  
17 jury trials. So -- well, any time we have a jury trial  
18 because of COVID, we are using two courtrooms: One for the  
19 proceedings and one for jury deliberations. Four courtrooms  
20 are being held for jury trials to use for that reason.

21 There is one courtroom that will be used for this trial.  
22 And the last courtroom is being used by all of the judges for  
23 criminal sentencings and criminal proceedings. That's it.  
24 There are only six courtrooms in this courthouse.

25 So hopefully that clarifies that question.

1 Okay. Let's keep moving.

2 Experts.

3 **MR. BORNSTEIN:** Your Honor, if I could keep us on  
4 deposition designations for just one moment. We have one  
5 other issue in the second bullet there.

6 If I can take a minute, if it would be helpful for me to  
7 explain that, I can.

8 **THE COURT:** Okay. I thought we had dealt with it.  
9 Since you only get four hours, if you're asking for more than  
10 four hours, the answer is no.

11 **MR. BORNSTEIN:** Absolutely not.

12 The issue here is, Your Honor, we may have more than four  
13 hours that we choose to designate. We recognize four hours is  
14 what Your Honor will take. And anything above the four hours,  
15 if someone wants to use it, will come out of the remainder of  
16 their trial time.

17 The issue the parties had discussed, and I think have a  
18 common mind on, but want to be sure our common mind is common  
19 with Your Honor's as well is the following: If a party, for  
20 example, has a total of seven hours of deposition  
21 designations, four of them would be covered by the four Your  
22 Honor has agreed to read, there would be three left. And it  
23 may be that as the trial proceeds, the party concludes that  
24 some portion of that three hours is actually not worth going  
25 into the record and that there's another half an hour of live



1 testimony with a witness that would be more useful for the  
2 Court.

3 And what we are hoping we're able to do is, we know we  
4 have a deadline to submit to Your Honor the deposition  
5 designations that we would like potentially to have in the  
6 record, with all of the objections having been either agreed  
7 or resolved by Judge Laporte, but we would like to be able, as  
8 the trial proceeds, to determine which of those portions we  
9 have provided to the Court we would actually like Your Honor  
10 to read in which we would --

11 **THE COURT:** That doesn't work because I'm reading  
12 them next week.

13 **MR. DOREN:** Your Honor --

14 **THE COURT:** Don't give me more than four hours. If  
15 there is other stuff that at the end or during the trial you  
16 decide that you would rather have me read those materials  
17 rather than take live testimony, I can do that at the end.

18 But I have -- you know, I finish this trial and I go into  
19 a jury trial two weeks after. So you're not the only case  
20 that I have. And I have scheduled -- I have structured my  
21 workload so that I can read this information in advance. So,  
22 I need your four hours in advance by the deadline I gave you.

23 If you want to substitute later your trial time for  
24 deposition designations, I can substitute it. I don't care.  
25 The time is there. You know, maybe that means if you have two

1 and a half hours and the other side has two and a half hours,  
2 then, you know, I may take Friday and close down the Court and  
3 go sit in my yard and read your five hours. We can do that.  
4 But I need your four hours by my deadline.

5 **MR. BORNSTEIN:** Okay.

6 If I understand correctly, we will be submitting to Your  
7 Honor the four hours by the deadline the Court set which we  
8 will be prepared to do with the objections addressed.

9 And to the extent either party has any additional  
10 deposition testimony that it would like to have become part of  
11 the record, either because of substantive testimony or in  
12 connection with a witness's testimony about a document that we  
13 would like to have come in, that's something we would do  
14 subsequently and we don't need to submit to the Court by the  
15 deadline you've set for the four hours?

16 **THE COURT:** As long as you understand that it's being  
17 done in replacement of your trial time.

18 **MR. BORNSTEIN:** Absolutely, Your Honor. Yes.

19 **THE COURT:** That's fine.

20 **MR. BORNSTEIN:** Okay. Great. That's helpful to have  
21 clarity on. I appreciate it.

22 **MR. DOREN:** Thank you, Mr. Bornstein, for raising it.

23 **THE COURT:** Okay. Now, can we move to experts?

24 **MR. BORNSTEIN:** Yes, Your Honor. Thank you.

25 **THE COURT:** Okay. Your first bullet.

1           **MS. MOYE:** Yes, Your Honor.

2           With respect to experts, we have talked about the concept  
3 of back-to-back experts a number of times, and we just wanted  
4 to confirm that we had the correct understanding.

5           As we understand it, the Court would find it to be helpful  
6 to have the economic theory experts testify back to back.  
7 That translates into Dr. Evans and Professor Athey for Epic  
8 back to back with Professor Schmalensee, Professor Lafontaine  
9 and Professor Hitt for Apple.

10          Apple would prefer to have the remainder of its expert  
11 witnesses presented in its case in full. We also have experts  
12 on security issues, experts on IP issues, things like that as  
13 opposed to having those experts back to back in the Epic case.  
14 But we just wanted to confirm the Court's preference with  
15 respect to that issue.

16          **MS. FORREST:** Your Honor, might I make one comment?

17          **THE COURT:** You may.

18          **MS. FORREST:** There is one additional economist,  
19 which is Mr. Rubinfeld, who had not been mentioned by  
20 Ms. Moye. I wasn't sure if she was thinking of him as part of  
21 the expert economist group. He does their -- a significant  
22 piece of their expert work, expert economist work or whether  
23 or not she was thinking of putting him later.

24          **MS. MOYE:** Yes. With respect to Mr. -- Professor  
25 Rubinfeld, we were planning to put him later. He is an

1 economist, but he is an economist who talks about IP licensing  
2 arrangements, the procompetitive nature of Apple's IP  
3 licensing to developers. And so it is a slightly different  
4 type of testimony than that at issue with Dr. Evans, Professor  
5 Athey, Hitt, Schmalensee, and Lafontaine.

6 So, yes, we did intend to include Rubinfeld in our case as  
7 opposed to as a part of the back-to-back exercise.

8 **THE COURT:** And who is the contrary that -- the  
9 opposite for Rubinfeld?

10 **MS. MOYE:** Epic has not designated, to my mind, an  
11 expert that responds to Rubinfeld. I will let the Epic  
12 lawyers chime in on that.

13 **MR. BORNSTEIN:** Yes, Your Honor. Dr. Evans responds  
14 to portions of Professor Rubinfeld's opinions that we think  
15 are worth responding to.

16 **THE COURT:** What about on the security issues; who  
17 are those?

18 **MR. BORNSTEIN:** We have a -- we will have a security  
19 expert testify in our opening case and we have a different  
20 security expert who will be providing a rebuttal opinion in  
21 response to Apple's security expert.

22 **MS. MOYE:** And, Your Honor, Apple has one security  
23 expert.

24 **THE COURT:** Are there any other categories?

25 **MS. MOYE:** The other category is survey experts. So

1 Epic has a survey expert, Rossi. Our corresponding survey  
2 expert is Hanssens, and then I believe Epic has a rebuttal  
3 survey expert Mr. Bornstein will identify for us.

4 **MR. BORNSTEIN:** Yes. That's Professor Mathiowetz.

5 **MS. FORREST:** We have one other, Your Honor, as well  
6 which is an accounting expert, Mr. Barnes, who is supportive  
7 of our economists but can stand separately as well. His work  
8 supports the economists.

9 **MS. MOYE:** Yes, Your Honor. Just to make sure we  
10 give you the full complement, we also have one IP expert that  
11 is a complement to Rubinfeld, Malackowski.

12 **THE COURT:** All right. That's fine. I did want the  
13 economists all together though.

14 **MS. MOYE:** Thank you, Your Honor.

15 **MS. FORREST:** Your Honor, just to be clear, would  
16 that include Professor Rubinfeld as well?

17 **THE COURT:** No.

18 **MS. FORREST:** All right.

19 **THE COURT:** Okay. Your second bullet?

20 **MS. MOYE:** This question, Your Honor, just related to  
21 the timing of rebuttal expert testimony given the back-to-back  
22 exercise.

23 It may be that we can reach agreement on this at this  
24 point now that we have clarity. We -- the concern was, are  
25 the rebuttal experts going to be called right after our

1 back-to-back expert or at the end of Apple's case as would  
2 normally be the case for rebuttal?

3 **THE COURT:** If they're economists, they are going to  
4 be called all at the same time.

5 **MR. BORNSTEIN:** Your Honor, we have two expert  
6 witnesses who are economists who have put in rebuttal reports.  
7 One of them is Dr. Evans, who you will have spent time with on  
8 his opening report, and the other one is Dr. Cragg.

9 And I certainly think that Dr. Evans is going to want to  
10 and need to respond to things that will come in through Apple  
11 fact witnesses during the course of the Apple case. So if we  
12 were to bring him back right away, after the Apple economists  
13 testify, we might want to have him testify in our rebuttal  
14 case to address fact testimony that comes in during Apple's  
15 case or he also responds to Dr. Rubinfeld's --

16 **THE COURT:** I don't understand, Mr. Bornstein.

17 What is he going to say?

18 **MR. BORNSTEIN:** Well, for one thing, Professor Evans  
19 is going to respond to Professor Rubinfeld, who, I understand,  
20 is now going to come in Apple's case.

21 **THE COURT:** Okay. That testimony can happen  
22 afterwards.

23 **MR. BORNSTEIN:** Sure.

24 And then he's going to be addressing, among other things,  
25 the procompetitive justifications that I assume we're going to

1 hear from Apple's fact witnesses.

2 **THE COURT:** Aren't they incorporated into the expert  
3 reports?

4 **MR. BORNSTEIN:** The Apple experts certainly cover the  
5 point, but I do think, Your Honor, we are going to hear fact  
6 testimony as well. And Apple will support its procompetitive  
7 justifications, I presume, they have in their findings of fact  
8 attempted to do so, with fact witness testimony with, for  
9 example, Mr. Schiller who is clearly going to be a key focus  
10 of the Apple case, will testify about, I presume, what Apple  
11 contends to be procompetitive benefits.

12 I think we need to have our economist be able to respond.

13 **THE COURT:** So an expert is not going to be able  
14 to -- okay. The expert's not going to be able to testify as  
15 to factual issues. All the expert can do is say, if you  
16 believe those factual issues, then my opinion is X. Or you  
17 shouldn't -- I don't even -- yeah. So I'm not exactly sure  
18 why it has to wait.

19 **MR. BORNSTEIN:** For example, Your Honor, if  
20 Mr. Schiller from Apple at trial is cross-examined effectively  
21 on a particular point that is a foundation of the expert  
22 opinion that's been offered by the Apple experts in a  
23 particular procompetitive justification, turns out through his  
24 testimony not to be supported, I think it will be important  
25 for us to have the economist be able to come and to say now

1 that the facts have come in and that a particular point that  
2 Apple has advanced is not, in fact, supported by the evidence,  
3 that affects my opinion in the following way. And to be able  
4 to frame for Your Honor the relevance of the factual record  
5 that has been created, I think, is a critical part of what the  
6 expert can do and needs to do on rebuttal.

7 And Professor Evans is going to be coming anyway to  
8 respond to Professor Rubinfeld. And I imagine, Your Honor, as  
9 scintillating as a witness as he may be, I imagine Your Honor  
10 doesn't want to see him three times.

11 **MS. MOYE:** Your Honor, if I can be heard on this  
12 issue.

13 Apple's position is that each of these experts should be  
14 testifying only once. We understand that the Court has said  
15 if there's some recentivity to Dr. Evans coming to address any  
16 new opinions from Professor Rubinfeld in our case, we can put  
17 that to the side. But on the proposal that Dr. Evans would be  
18 attempting to rebut factual witnesses, we think that testimony  
19 would be highly inappropriate and that the Court has already  
20 established a mechanism for the parties to address whether  
21 expert testimony was supported by the record.

22 **THE COURT:** Mr. Bornstein, I am trying to digest an  
23 incredible amount of information. Right? I've already read  
24 hundreds of pages. There is no surprise here. The notion  
25 that -- I am sure you are all great trial lawyers, but the



1 notion that we are going to have a, you know, a huge ah-hah  
2 moment because of a cross-examination is probably low.

3 I still don't understand, given that there are no  
4 surprises here, there is no jury, why Evans can't say, Your  
5 Honor, you're going to hear from Mr. Schiller and he's going  
6 to make the argument, because I've read his testimony, he's  
7 going to make the argument about A, B, and C. I believe that  
8 that's inaccurate; that there is no way they can prove that.  
9 Or there is no -- there's no credible reason for believing it.  
10 And if you don't believe A, B, and C, then it's my view that  
11 X.

12 That's -- having all of that economic testimony  
13 consolidated will help me digest all of it at once. I don't  
14 need Evans to come back and say, oh, Mr. Bornstein  
15 cross-examined Schiller in such a fabulous way that you can't  
16 believe what Schiller has to say.

17 **MR. BORNSTEIN:** Well, I --

18 **THE COURT:** An economist doesn't need to tell me  
19 that.

20 **MR. BORNSTEIN:** I understand the point Your Honor is  
21 making about that. I guess the practical question we have is  
22 the following: If Professor Rubinfeld is testifying in  
23 Apple's case, then we need to have Professor Evans come at the  
24 end so he can respond to Professor Rubinfeld. Professor Evans  
25 has put in an opening report, he has put in a rebuttal report.

1 So he is going to testify twice. He needs to testify twice.  
2 I don't know why Ms. Moya says he is coming once. He's an  
3 opening expert and he's a rebuttal expert.

4 And I think the only question is whether we have him come  
5 twice or we have him come three times, which we were trying to  
6 avoid. So we can have him, if it's helpful to the Court, we  
7 can certainly have him go after the Apple economists. The  
8 problem is, if Professor Rubinfeld is coming later, then he's  
9 going to have to come back to deal with Professor Rubinfeld  
10 anyway.

11 **THE COURT:** Yes, but by that time we are talking  
12 about IP licensing, we're not talking about the fundamental  
13 economic theory that Epic is suggesting in terms of its  
14 antitrust claims.

15 **MR. BORNSTEIN:** Well, on that we may have a  
16 difference of opinion with Apple, Your Honor, on the content  
17 of Professor Rubinfeld's testimony. He is an economist. He  
18 has given an economic opinion. It's an economic opinion that  
19 relates to issues of licensing, but he talks about free riding  
20 and he talks about procompetitive --

21 **THE COURT:** Well, then maybe Rubinstein -- Rubinfeld  
22 or Rubinstein needs to testify with the economists.

23 **MR. BORNSTEIN:** That would -- sorry.

24 **THE COURT:** My only point is, look, is if is it  
25 Rubinfeld, right?

1           **MS. MOYE:**   Rubinfeld.

2           **THE COURT:**   If his testimony is cabined to this one  
3           issue, and Evans is going to come back and rebut it, then  
4           Evans rebuts it on the one issue.

5           If you're anticipating that there's going to be all sorts  
6           of other stuff happening between Evans and Rubinfeld, and so  
7           you would like to have a second shot, that's not okay. You  
8           know what they are going to put on. They have given you 385  
9           pages to explain to you what they are going to put on. Again,  
10          there are no surprises here.

11          **MR. BORNSTEIN:**   Is Your Honor contemplating that we  
12          would not have Professor Evans come back after Professor  
13          Schmalensee testifies for example? We need to be able to have  
14          him come and respond to what they choose to put in their case.  
15          He is a rebuttal expert and he's responding to their --

16          **THE COURT:**   I thought they were all coming at the  
17          same time. Didn't we just talk about that?

18          I was given a list of six experts; three from Epic and  
19          three from Apple. If you want to put on your three and then  
20          they are going to put on your three and you want to bring your  
21          other one back, I don't care. That's fine with me. I just  
22          want them all to testify back to back.

23          **MR. BORNSTEIN:**   Understood.

24          So we have, just to make sure, we have the list because I  
25          think there may be one that's off the list.

1 We have three economists: It's Professor Evans, Professor  
2 Athey, and Dr. Cragg. Dr. Cragg submitted only a rebuttal  
3 report, so we anticipate calling him as a rebuttal witness in  
4 response to the economic testimony from the Apple witnesses.

5 Dr. Evans submitted both an opening and a rebuttal report,  
6 and so we anticipated calling him to provide opening testimony  
7 and then returning for rebuttal. And Professor Athey  
8 submitted only an opening report, so she's easy. She would  
9 just come and give her testimony.

10 If it is the Court's preference, which is completely fine  
11 with us, to have all of this come together, what I think we  
12 are landing on, is we would have our opening expert economist  
13 give their testimony, Apple would have their four economists  
14 give their testimony, and then we would have our rebuttal  
15 economists respond. And that would come all together for the  
16 Court. If that is the most useful thing, then that's  
17 absolutely fine with us.

18 **MS. MOYE:** Your Honor, for clarity, what Apple  
19 proposes is that after Epic has its opening economic theory  
20 experts, it's Evans and Athey testify, Apple will call  
21 Schmalensee, Lafontaine, and Hitt, three of its four  
22 economists. The fourth economist is Rubinfeld who addresses  
23 IP licensing issues. He would be called in Apple's  
24 case-in-chief.

25 **THE COURT:** So what I hear the order of experts is

1 going to be is Evans, Athey or Athey, then Schmalensee,  
2 Lafontaine, and Hitt, and then Evans and Cragg or Cragg.

3 **MR. BORNSTEIN:** And the only --

4 **THE COURT:** If you want to have Evans testify as to  
5 his or her view of the three economists who are testifying  
6 afterwards before they testify, that's fine. Again, I just  
7 want this to be all within -- all together.

8 **MR. BORNSTEIN:** The only wrinkle that I think we are  
9 having, Your Honor, is the placement of Professor Rubinfeld.  
10 Because Professor Rubinfeld, although he does address IP  
11 issues, he does also give rebuttal to Professor Athey. That  
12 is part of his testimony. And then Professor Evans responds  
13 to Professor Rubinfeld.

14 **THE COURT:** Do I have his report yet?

15 **MS. MOYE:** Yes, Your Honor. It was submitted with  
16 the trial readiness binder.

17 **MR. BORNSTEIN:** So we are happy to have everybody  
18 together, I just -- if we pluck one out --

19 **THE COURT:** It sounds like you object to Rubinfeld  
20 testifying separately.

21 **MR. BORNSTEIN:** I do not object to him testifying  
22 separately if we are able to have Professor Evans come back  
23 and respond. But at that point Professor Evans is testifying  
24 three times, and Your Honor will be hearing the response to  
25 Athey separately in Apple's case unless Professor Rubinfeld

1 does not intend to pursue that portion of his opinion that  
2 responds to Athey.

3 **MS. MOYE:** Your Honor, what I heard was there was no  
4 objection to Rubinfeld coming later, so I don't know if  
5 there's an issue --

6 **THE COURT:** There is an objection. He just stated  
7 it.

8 **MS. MOYE:** I thought he started with there was no  
9 objection to Rubinfeld coming later.

10 **THE COURT:** Lawyers say things but ultimately there  
11 is an objection. That's why we are having this discussion.

12 **MS. MOYE:** Yes. We would like to call Rubinfeld at  
13 the -- in our case-in-chief because he discusses distinctly  
14 different issues. He focuses --

15 **THE COURT:** Apparently he doesn't. Apparently he  
16 straddles the economic issues with other issues.

17 **MS. MOYE:** There is some response to Athey in the  
18 Rubinfeld report.

19 Whatever is most helpful for the Court, we are happy to  
20 do, Your Honor.

21 **THE COURT:** Well, it sounds like he needs to testify  
22 twice. If Evans needs to testify twice, he needs to testify  
23 twice.

24 **MS. MOYE:** So, his response --

25 **THE COURT:** Or you can have him testify with all of

1 your other experts.

2 **MS. MOYE:** We understand, Your Honor.

3 **THE COURT:** Meet and confer and let me know what's  
4 going to happen.

5 **MS. MOYE:** Okay.

6 **MR. BORNSTEIN:** We'll do that.

7 **MS. MOYE:** Your Honor, just to be clear, our proposal  
8 was that Schmalensee, Lafontaine, and Hitt would definitely be  
9 included in the back-to-back exercise, but we had not figured  
10 out the order for those three witnesses.

11 So I didn't want to create a misperception there.

12 **THE COURT:** Okay. Noted. Anything else on experts?

13 (No response.)

14 **THE COURT:** All right. Next issue.

15 I don't know who's suggesting shadow reporters; we don't  
16 do that. So whoever request it is, it is denied. And I  
17 don't know why you would need it anyway. You are getting  
18 realtime through the official court reporter.

19 **MR. DOREN:** Your Honor, if I may, that was my  
20 follow-up question. If we can get the live feed through the  
21 court reporter remotely, we would not need a shadow reporter  
22 or request one.

23 **THE COURT:** Well, you can't have one.

24 **MR. DOREN:** So I said, I will not make the request.

25 **THE COURT:** And I know that they provide realtime so

1 I'm not exactly sure what the issue is.

2 You probably -- that's a technology question, and your  
3 technology folks should connect with our folks, especially if  
4 all your people are going to be on the Zoom platform. So I  
5 don't know what the issue really is, Mr. Doren.

6 **MR. DOREN:** Sure, Your Honor. And that's perfect.

7 If we have leave to put our technology people together to  
8 work out remote access to the live feed, that would be  
9 perfect.

10 The issue is, or the practical issue is, given the Court's  
11 desire for daily redlines of the findings of fact, the goal is  
12 to have the live feed reach those on the team who are outside  
13 of the courtroom so that we can keep up with that task over  
14 the course of the day.

15 **THE COURT:** Well, if you can't do it, then I will  
16 give you 48 hours instead of 24, and that will take care of  
17 that problem.

18 **MR. DOREN:** Thank you, Your Honor. We will have our  
19 IT people confer and report back to the Court.

20 **MR. BORNSTEIN:** Your Honor, if the 48-hour rule -- or  
21 48-hour concept is acceptable to the Court, I think I speak  
22 for the members of the trial team that are not currently on  
23 the platform with us, that I think it would help them from  
24 being up all night each night in catching up with the day's  
25 transcript and to be able to work on it during the day so we



1 are getting it to you one day in the rear, so to speak.

2 **MR. DOREN:** More broadly put, Your Honor, I think the  
3 question that the parties have for the Court is, as a  
4 practical matter, how would you like to handle -- and when  
5 would you like to receive these updates of -- redline updates  
6 based on the testimony as it comes in?

7 **THE COURT:** So 48 hours is fine. They are long days.  
8 When I read your proposed findings of fact and conclusions of  
9 law, I realized that you did not indicate in there for much of  
10 it -- sometimes you did, but for much of it you did not  
11 indicate what the source of the proposed findings of fact  
12 especially was. So, it's not easy to -- it's not easy to just  
13 shift a, you know, proposed name with the transcript cite.

14 So I think that it's probably -- it may be easier to, you  
15 know, to just change font color to suggest that something's  
16 actually come in. So right now everything is in black. Pick  
17 a color. If fact number 62 comes in, change it to blue or  
18 change it to red and put a transcript cite.

19 And if you have to massage it because it didn't come in  
20 the way the lawyers thought it would come in, then you massage  
21 it. And then what you would do is, we don't need to file  
22 those things. Just send it to our proposed mailbox --  
23 proposed order or chambers email so that way I can keep track  
24 of what's coming in versus what hasn't come in. I will keep  
25 track of that electronically.

1           **MR. DOREN:** Thank you, Your Honor.

2           And if it is 48 hours, that would be the end of the second  
3 day after the day for which it's being updated?

4           **THE COURT:** The end of the day, yes.

5           **MR. DOREN:** Thank you.

6           **THE COURT:** I can guarantee you, I'm not going to be,  
7 after a full day with all of you, I'm not going to be itching  
8 for someone to print that out and give it to me. As I said, I  
9 do have a few other cases on my docket. But I do want it  
10 there and available for me so that I can know how we are  
11 making progress and where we are not.

12           I mean, look, sometimes the most -- when I've done this  
13 before, sometimes the most helpful information is what you  
14 didn't get in. Because all of these conclusions of law are  
15 based upon a theory of what the factual record is going to  
16 look like. And when you actually don't get it in, because  
17 that is not what the witnesses actually say as opposed to what  
18 the lawyers think they are going to say, that helps me focus  
19 on, you know, something that may not, in terms of the ultimate  
20 conclusion, something that was never proved.

21           Plus, again, it keeps everything really transparent  
22 between the both sides.

23           Okay? Any questions on that?

24                               (No response.)

25           **MR. BORNSTEIN:** We do have this other question on the

1 findings of fact in our second bullet which relates to Your  
2 Honor's order from March 30 which stated that any objections  
3 to --

4 **THE COURT:** You know, I put that in there because --  
5 and this is just for something major. You know, I will give  
6 you an example.

7 Hit and run case. And, you know, big question about  
8 whether the light was red or the light was green. And it  
9 comes in totally different than people expect or at least  
10 what's presented to the Court is totally different.

11 If there is something that is not -- that is not arguable,  
12 in your view, I want to know about it sooner rather than later  
13 because memories -- I can try to fix it.

14 But that's what that objection would be; if there is  
15 something that's really not arguable and that you think the  
16 other side just got flat wrong, then let me know so that I can  
17 try to figure it out. Check my own notes while my memory is  
18 fresh and we can try to -- so I expect to have nothing, I  
19 expect to have no objections to be clear. But I put it there  
20 just in case.

21 **MR. BORNSTEIN:** This is contemplated, if I understand  
22 correctly, Your Honor, to be a situation where a party  
23 indicates in their findings of fact that a particular fact was  
24 proven, but the other party believes that they have just  
25 completely botched the testimony, not that it's a shading or a

1 debate about how something ought to be interpreted, but it's  
2 really just flat out wrong and it needs to be brought to the  
3 Court's attention. Is that --

4 **THE COURT:** I don't want to have to deal with these  
5 objections later in terms of what the record is.

6 You all have very different views, very different views.  
7 Someone is going to lose. So there are two very different  
8 distinct approaches to this case.

9 But in terms of what's actually said, there should be no  
10 dispute. And I expect that, you know, when you go back or  
11 your teams go back and change the color because you think  
12 something's been proved, you know, sometimes those words are  
13 going to have to change a little bit because the evidence is  
14 not going to come in the way the lawyers have scripted it.

15 But that's not what this is about. This is really for  
16 something that is really almost outrageous. Right?

17 **MR. BORNSTEIN:** That's very helpful. I was concerned  
18 because otherwise we find ourselves arguing over minor nuances  
19 that I am sure we would never agree on, and this is intended,  
20 it sounds like, to be true outrageous misstatements of the  
21 testimony. That's helpful to know.

22 **THE COURT:** Like I said, you will probably have to  
23 change the -- because people are not going to testify in the  
24 way you've scripted it.

25 So using quotes will help.

1           **MR. BORNSTEIN:** That is helpful clarification. Thank  
2     you.

3           **MR. DOREN:** Thank you for the guidance.

4           **THE COURT:** Okay. We talked about redactions before,  
5     right, so nothing else on that?

6           **MR. DOREN:** I believe that is correct, Your Honor.

7           **THE COURT:** Okay. Anything else that you want to  
8     talk about before I move to my agenda?

9           **MS. FORREST:** No, Your Honor.

10          **THE COURT:** All right.

11                 So you've provided the Court with some stipulations. So  
12     I'm accepting the stipulation that Epic will present an  
13     opening statement followed by Apple.

14                 I'll accept the stipulation with respect to the manner in  
15     which the witnesses' deposition designations will be  
16     introduced. That's your number two.

17                 I thought I already excluded all witnesses from the  
18     courtroom. To the extent that wasn't in a prior order, it is  
19     ordered. It is one of my standard --

20                 **MR. DOREN:** I think the stipulation and the order  
21     crossed each other in the mail, Your Honor. We did see that  
22     order.

23                 **THE COURT:** Okay. But there was something in here.  
24     Do we know yet who your corporate representatives are going to  
25     be? Given how many people -- do we know who that's going to

1 be?

2 Are they going to be in the courtroom or are they just  
3 going to be participating on the platform?

4 **MS. FORREST:** Your Honor, the Epic corporate  
5 representative will be Tim Sweeney and he will be present from  
6 the beginning of the trial until the end in the courtroom.

7 **MR. DOREN:** And Apple's corporate representative will  
8 be Phil Schiller, and we expect him to be in the courtroom as  
9 well.

10 **THE COURT:** Okay. It's fine for you to -- I'll  
11 accept your stipulation to update your witness lists in terms  
12 of "will" and "may" call status on April 26th.

13 With respect to your stipulation regarding Magistrate  
14 Judge -- or retired Magistrate Judge Laporte that stipulation  
15 is granted. That is at Docket 465. I take it the motion at  
16 441 is withdrawn?

17 **MR. BORNSTEIN:** Yes, Your Honor. This is the Special  
18 Master motion?

19 **THE COURT:** Yes.

20 **MR. BORNSTEIN:** Withdrawn. If the Court needs us to  
21 file anything to document that, we will do that. We can  
22 figure that out without --

23 **THE COURT:** No, I'll do it in my order.

24 **MR. BORNSTEIN:** Thank you.

25 **THE COURT:** Okay. Do we know yet whether, in fact,

1 witnesses will be testifying remotely or not?

2 **MS. FORREST:** Your Honor, Epic knows now of one third  
3 party who will testify remotely in Epic's case. And that is  
4 the only witness that will be testifying remotely.

5 **THE COURT:** And who --

6 **MS. FORREST:** That is Mr. Patel via video.

7 **THE COURT:** Okay.

8 Any for Apple?

9 **MR. DOREN:** Your Honor, at this point I believe  
10 everyone will be live. We'll let the Court know if that  
11 changes.

12 **THE COURT:** Okay.

13 **MS. FORREST:** Your Honor, let me -- just to be clear,  
14 the Epic single witness testifying remotely was dependent upon  
15 a discussion that Apple and Epic were having yesterday about  
16 Apple not calling another witness who was going to have to  
17 testify remotely.

18 I believe that witness has been withdrawn and so,  
19 therefore -- it hasn't been confirmed yet, but I believe it  
20 was going to be confirmed today and that's why we only have  
21 just the one now.

22 **THE COURT:** Okay.

23 By any chance do you all have a list of acronyms? You use  
24 acronyms all the time and I know the press of trial sometimes  
25 you move things around and so I don't get a definition before

1 the acronym is actually used. I get the definition pages  
2 later.

3 Does anybody have a list of acronyms that you are  
4 routinely using that you can send?

5 **MS. FORREST:** Your Honor, we have two things that  
6 might be of assistance. One, we prepared for the court  
7 reporters, a list of words that would be perhaps helpful for  
8 them to have. Separately we also have a list of words with  
9 definitions.

10 I think it would be helpful for us to confer with Apple to  
11 be sure that we agree on those for the acronyms and then we  
12 can get it right to Your Honor.

13 **THE COURT:** That would make sense.

14 **MR. DOREN:** Agreed.

15 **THE COURT:** Okay.

16 Okay. I think what this does is terminates a number of  
17 issues on the docket. Those were the only things left that I  
18 had.

19 Let me just check one thing. I also understand that you  
20 each have reserved a conference room in the attorney's lounge.

21 I have not received any requests to bring in equipment.  
22 So don't forget, you need to send those to me so I can review  
23 them. Marshals will not let you bring in anything like that  
24 without an order. I think that's probably it.

25 Make sure that you arrive in time to get through security.



1 Ms. Stone usually has the courtroom open about quarter of,  
2 Ms. Stone?

3 **THE CLERK:** Yes. Yes, quarter to 8:00.

4 **THE COURT:** And then we start right at 8:00 o'clock  
5 every day. I will, on day one, I'll tell you what my computer  
6 says. And you can set your clock to my computer. That's when  
7 we start, 8:00 o'clock. Okay?

8 As you know, I'm here if you need me, but I think I won't  
9 see you again until I see you live on May 3rd.

10 You will be getting daily time sheets. We use an Excel --  
11 actually do it manually. I haven't figured out -- I know that  
12 they have the chest clocks, but it doesn't really work for me.  
13 So you will get your -- an Excel spreadsheet and we'll keep  
14 track of your time. But I do need to have the other stuff  
15 with me so I can read in advance on time, Mr. Bornstein.

16 Okay? Any other questions?

17 **MR. DOREN:** No.

18 **MS. MOYE:** No thank you, Your Honor.

19 **MS. FORREST:** Thank you.

20 **THE COURT:** All right.

21 And then, yes, it looks like we will be testing --  
22 Ms. Stone is telling me on 4/29 10:00 a.m. people are coming  
23 from your offices to set up equipment on Thursday.

24 **MS. FORREST:** Yes.

25 **THE COURT:** Okay. All right. Good enough. Safe

1 travels. We'll see you soon.

2 **MR. DOREN:** Thank you, Your Honor.

3 **MR. BORNSTEIN:** Thank you, Your Honor.

4  
5 (Proceedings concluded at 10:30 a.m.)  
6

7  
8 **CERTIFICATE OF REPORTER**

9 I, Diane E. Skillman, Official Reporter for the  
10 United States Court, Northern District of California, hereby  
11 certify that the foregoing is a correct transcript from the  
12 record of proceedings in the above-entitled matter.

13  
14 

15 DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

16 Thursday, April 22, 2021  
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